No. 87-5765

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

KEVIN N. STANFORD - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ Of Certiorari
To The Supreme Court Of Kentucky

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does The Eighth Amendment Exempt From Capital Punishment All Murderers Who Were Under The Age Of Eighteen Years When They Committed Their Crimes?

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion below is reported as *Stanford v. Commonwealth,* Ky., 734 S.W.2d 781 (1987). On direct appeal of conviction, the Kentucky Supreme Court affirmed Petitioner's death sentence for capital murder and his prison sentences for first degree robbery, first degree sodomy, and receiving stolen property.

Rejecting the Petitioner's "demand[ ] that he has a constitutional right to treatment" as a juvenile offender, the Kentucky Supreme Court ruled that his "age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him." *Stanford, supra* at 792. The court explained that:

> . . . Stanford has been given the benefit of treatment available to youthful offenders in the Commonwealth on a repeated basis over a period of several years before his involvement in the crimes charged in the instant case. Since the age of ten, Stanford has revolved in and out of juvenile court having committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few. *Id.*

JURISDICTION

United States Supreme Court Rules 15.1(a) and 21.1(a) in pertinent part state:

> The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the question set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

The Court generally has declined to address claims presented for the first time on certiorari review, or those beyond the legitimate scope of the question for which review was granted. See, *e.g., Buchanan v. Kentucky,* ___*U.S.*___, 107 S.Ct. 2906, 2908, n.1 (1987); *Hill v. California,* 401 U.S. 797, 805-806 (1971); *Lear, Inc. v. Adkins,* 395 U.S. 653, 675 (1969); *Cardinale v. Louisiana,* 394 U.S. 437, 438-439 (1969); *Lawn v. United States,* 355 U.S. 339, 362, n.16 (1958). Compare: *Batson v. Kentucky,* 476 U.S. 79 (1986).

Petitioner's brief attempts to raise several constitutional claims not fairly included in the question for which certiorari was granted. The question presented in this case is whether or not all capital murderers less than eighteen years old at the time of their crimes must be automatically exempted from the death penalty on the sole basis of their birthdates.

In part "D" of his brief, however, Petitioner tries to raise the following extraneous claims that (i) as a matter of Due Process, juvenile jurisdiction waiver statutes must specifically require a reasonable doubt standard of proof, (ii) written findings by the sentencer concerning the presence or absence of mitigating circumstances are constitutionally required, (iii) written instructions to the jurors requiring them to presume the inappropriateness of capital punishment are constitutionally required, (iv) the Kentucky Supreme Court's proportionality review was "fatally

flawed" because comparison was made with the cases of juvenile and adult offenders alike, and (v) Kentucky's juvenile jurisdiction waiver statute was applied in a racially discriminatory manner.

The sole issue before this Court is whether the execution of a 17-year-old capital offender is such cruel and unusual punishment that it violates the Eighth Amendment in all cases. Because none of the foregoing claims are fairly included within the question for which certiorari was granted, Respondent respectfully submits that the Court lacks jurisdiction to consider them. In observance of the Court's procedural rules governing this matter, Respondent will confine its discussion herein to the question for which certiorari was granted.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted.

The Fourteenth Amendment to the United States Constitution in relevant part states that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

COUNTERSTATEMENT OF THE CASE

A. Petitioner's Crimes

The victim in this case, 20-year-old Barbel Poore, was an employee of the Cheker gas station on Cane Run Road in Louisville, Kentucky. (TE 399, 942, 947). She and her parents were acquainted with Petitioner, having conversed with him on several occasions. (TE

519) Petitioner lived in the apartment complex adjoining the Cheker station. (TE 407-408, 475).

Troy Johnson was a mutual friend of both Petitioner and his co-defendant, David Buchanan. (TE 1029, 1047). On January 7, 1981 Buchanan approached Johnson with a plan to rob the Cheker station. (TE 1029-1030). Johnson provided Buchanan with a handgun. (TE 1031).

Buchanan telephoned Petitioner in regard to the plan. (TE 1032-1033). The three met at Petitioner's apartment, then proceeded to the Cheker station where Johnson remained inside the car. (TE 1032-1034). As Petitioner was leaving the car to go inside the Cheker station, he expressed concern to Buchanan and Johnson that the victim might recognize him by his clothing. (*Id.*).

During the next 45 minutes, Barbel Poore was robbed, raped, orally sodomized, and anally sodomized. (TE 364-365, 373, 385-386, 398, 405, 946, 1034-1035, 1044, 1053). Once during this ordeal, Buchanan briefly returned to the car with a two-gallon can of gasoline and told Johnson to continue waiting. (*Id.*). The sexual attack took place on the restroom floor of the gas station. (TE 485). Petitioner initially raped the victim in a standing position while she held onto the sink, after which he and Buchanan took turns raping and sodomizing her on the floor. (*Id.*).

Eventually, Buchanan returned to Johnson's car a second time and instructed him to follow Petitioner, who was driving the victim in a car belonging to her mother. (TE 1035-1037). Buchanan explained to Johnson that they were going to have more sex with the victim elsewhere. (*Id.*). After both cars arrived at a secluded area on Shanks Lane in Louisville, Buchanan got out and walked over to the victim's car where Petitioner was standing. (*Id.*).

Petitioner allowed the victim to smoke a cigarette. (TE 486). Instead of having further sex with the victim, Petitioner leaned inside the victim's car and shot her in the face from point-blank range. (TE 364, 366-367, 1037). At that point Johnson got out of his car, poured the stolen gasoline into his tank, started the engine, and began backing up. (TE 1037-1038). Petitioner then fired a second shot into the back of the victim's head, causing her death. (TE 364-368, 372, 486, 1037-1038).

The victim's corpse was left kneeling in the back seat of her mother's car, naked from the waist down and with her buttocks elevated. (TE 401). A "large volume of semen" was on the left sleeve, front and back hem of her outer jacket, on her inner jacket, on her sweater, on her panties, and on the back seat of her mother's car where her head lay. (TE 401, 792-793, 796-798, 800, 805-806). Among the foreign pubic hairs on the victim's buttocks was one similar in microscopic characteristics to those belonging to Petitioner. (TE 578, 585, 602, 604, 645, 792, 794-795, 807, 811). Injuries to the victim's anus included a contusion "with radiating abrasions over the anal mucosa over the entire circumferential surface," inside of which were "large quantities of identifiable spermatozoa." (TE 363-365).

Buchanan got into the front seat of Johnson's two-door car before Petitioner got into the back seat. (TE 1040). As they were driving away from the murder scene, Petitioner smiled and asked Johnson whether he "wanted to do anything else." (TE 1041). When Johnson responded negatively, Petitioner tossed the murder weapon into the front seat. (*Id.*). Johnson dropped him off at the intersection of Shanks Lane and Cane Run Road, across the street from the Cheker station. (*Id.*).

Later that night, a neighbor named Alexis Sloan saw Petitioner carry two large boxes of cigarettes away from the Cheker station. (TE 1003, 1006-1007). Sloan agreed to "hold" them for Petitioner. (TE 1008). On the following day, Sloan and one Owen Smyzer put the cigarettes into plastic garbage bags and roamed about the neighborhood selling them. (TE 1011-1012). Afterwards, Petitioner told Sloan that the cigarettes were from the Cheker station and that he had "made a play" for them. (TE 1013-1014, 1022-1023).

While awaiting trial for capital murder, Petitioner sneaked up behind a security guard, put the end of a pencil against his ear and said, "Click, click, click, just like the girl, I'm going to blow your mother. . . brains out." (TE 1062-1063).

On another occasion, a different corrections officer heard Petitioner bragging to seven other juvenile inmates about what he had done to Barbel Poore. (TE 1076-1078). Petitioner boasted to the corrections officer about his having sodomized and raped the victim. (TE 1080). He explained the execution of the victim as follows:

> I had to shoot her, the bitch lived next door to me and she would recognize me. * * * I guess we could have tied her up or something or beat the . . . out of her and told her, if she tell, we would kill her. (TE 1082).

At that moment during his conversation with the corrections officer, Petitioner "began laughing." (*Id.*).

Petitioner was convicted of capital murder, first degree sodomy, first degree robbery, and receiving stolen property. (JA 108-112). He was sentenced to death and 45 years in prison. (*Id.*).

His jointly tried co-defendant, 16-year-old David Buchanan, was convicted of murder, first degree sodomy, first degree robbery, and first degree rape. Exempted from capital punishment because he was not

the "triggerman" (JA 58-59), Buchanan was sentenced to life and 60 years in prison. *Buchanan v. Commonwealth,* Ky., 691 S.W.2d 210 (1985), affirmed, *Buchanan v. Kentucky,* ___U.S.___, 107 S.Ct. 2906 (1987).

The getaway driver, 15-year-old Troy Johnson, was tried as a juvenile and testified against Petitioner and Buchanan. (TE 1048-1050).

B. Procedural History

Petitioner was 17 years old at the time of these crimes. (JA 8). Following his arrest, Petitioner was arraigned in the Juvenile Division of the Jefferson District Court. (JA 7). There he was represented by the same public defender who had been provided to him during his initial pre-arrest interrogation by the police. (SH 14-18, 91-103; JA 7).

Ky.Rev.Stat. §208.170 provided that juvenile court jurisdiction could be waived, and the offender be tried as an adult, if he either was (i) charged with a Class A felony or capital crime, or (ii) over 16 years of age and charged with a felony.

On May 22 and July 14, 1981 the juvenile court conducted hearings to determine whether Petitioner should be transferred to the Jefferson Circuit Court for trial as an adult offender. (JA 7-8). A total of 19 witnesses testified at those hearings, which resulted in the dismissal of the rape charge but also in the transfer of Petitioner for trial as an adult offender on the remaining charges. (JA 8). Finding the Petitioner's transfer to be in the best interest of himself and of the community (JA 10), the juvenile court listed its prior but unsuccessful attempts at his rehabilitation.[1]

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[1] On prior occasions, Petitioner had been sent to five different treatment facilities as the result of delinquency proceedings. (JA 9). "Since the age of ten, Stanford has . . . committed various offenses including arson, burglary, sexual abuse, theft and assault, to name but a few." *Stanford v. Commonwealth, supra,* 734 S.W.2d at 791, n.8.

Petitioner was indicted by a grand jury on November 5, 1981. (TR 81-CR-1218, 1-4).

The Jefferson Circuit (adult) Court considered and rejected Petitioner's motion[2] that he be tried as a juvenile. (JA 11-15, 42-44).

During the hearings on that motion, however, it came to light that the grand jury had not been informed of its option to recommend that Petitioner be tried as a juvenile in spite of the district court's prior transfer of him to the circuit court. Ky.Rev.Stat. §208.170(5)(a). (3/1/82 Hearing 179-180, 210-217; 3/8/82 Hearing 91-100). Petitioner was re-indicted accordingly. (TR 82-CR-0406, 1-4; 3/8/82 Hearing 11).

Petitioner and his co-defendant, David Buchanan, were jointly tried before a jury in August of that year. (JA 1). In accordance with the jury's verdict, Petitioner was sentenced by final judgment entered September 28, 1982. (JA 108-112).

The Kentucky Supreme Court affirmed Petitioner's conviction and sentences thereon by opinion rendered April 30, 1987. (JA 113-138). His petition for rehearing was denied on September 3, 1987. (JA 139).

This Court granted certiorari by order entered October 11, 1988. (JA 155). On October 17, 1988 the Court limited certiorari to "Question VIII presented by the petition." (JA 156).

SUMMARY OF ARGUMENT

I.

Imposition of the death penalty upon murderers less than 18 years old at the time of their crimes does not violate the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.

[2] Kentucky's juvenile jurisdiction waiver statute, Ky.Rev.Stat. §208.170(5)(b), conferred such discretion on the circuit court.

The Court should not depart from its longstanding premise that all capital offenders must be given individualized consideration by the sentencer. It is unrealistic to assume that all persons belonging to this age group share the same degree of immaturity. Common human experience indicates that maturity varies from individual to individual. There is no magic age at which all persons suddenly achieve the sophistication and judgment of an adult, for this is a gradual process affected by various factors. These individual differences among capital offenders of this age group should be taken into account accordingly.

Society's views are best reflected by legislative enactments. The very purpose of a legislature is to create laws consistent with the views of the majority of voters, at least in democratic societies such as the United States. Consequently, the enactments of a State legislature are the most reliable indicators available. Line-drawing is arbitrary whether it is done by the judiciary or by the legislature. The role of the judiciary is not to determine whether line-drawing on the part of the States is arbitrary, for it always will be arbitrary. Instead, the judiciary's function is to measure those lines or the absence of them against a constitutional standard. In this case the constitutional standard is defined by what American society considers cruel and unusual punishment. Unless a legislative enactment runs afoul of a clearly defined societal consensus, the Court should not draw its own line. *See,* Hoffman, "On The Perils of Line-Drawing: Juveniles and the Death Penalty," 40 Hastings L.J. 2 (1989).

II.

Prior to the date on which Petitioner murdered Barbel Poore, Kentucky's legislature considered and then reconsidered the idea of setting a minimum age for capital punishment. Kentucky's juvenile jurisdic-

tion waiver statute, whereby offenders under 18 years of age could be transferred to a higher court for trial as an adult, initially imposed no minimum age for capital punishment. By providing a specific age minimum (16 years) for the transfer of *non-capital* felons, however, Kentucky's legislature irrefutably demonstrated *in the same statute* that it had *considered* but rejected such a limitation with respect to capital offenders. Ky.Rev.Stat. §208.170.

In 1980, one year before the crimes at issue here, Kentucky's legislature reconsidered this matter and as a result amended that statute so as to exempt from capital punishment all persons under 18 years of age. The legislature further provided, however, that the amendment would not become effective until 1982. Thus, the Petitioner would not have benefitted from this amendment even had it become effective as originally scheduled. He committed his crimes in 1981, after the amendment was enacted but before it was to take effect. §Ky.Rev.Stat. 208F.040.

That amendment never became effective.

In 1986, the Kentucky legislature replaced its original transfer statute with a new one which set a minimum age limit of 16 years for capital punishment. Ky.Rev.Stat. §640.040. That enactment became effective in 1987.

Thus, before Petitioner committed these crimes, Kentucky's legislature demonstrated its awareness that juveniles were eligible for capital punishment. This was a conscious and considered decision by the democratically elected representatives of Kentucky.

III.

In all the States where juveniles are eligible for capital punishment, defendants of that age group enjoy additional safeguards beyond those conferred upon

chronological adults. Petitioner's case is an excellent example of this.

First, by enacting a juvenile code, Kentucky has indulged a presumption that many individuals within this age group are too immature for criminal punishment as an adult offender. At the same time, however, the enactment of a juvenile jurisdiction waiver statute is a reasonable recognition that some of these individuals have achieved adult maturity despite their chronological age. Thus, capital offenders such as Petitioner begin with a rebuttable presumption of immaturity. The government, not the accused, must prove otherwise in order to accomplish transfer of the case to a higher court for trial.

The second failsafe accorded Petitioner in this case was the statutory requirement that the grand jury be informed of its option to recommend his transfer back to the juvenile court.

Petitioner's third extra measure of protection was the adult court's statutory option to consider anew and effectively vacate the waiver of juvenile jurisdiction.

Fourth, the jury which sentenced Petitioner in this case was instructed to consider his age in mitigation of the crimes. Such special consideration of Petitioner's youthfulness by the sentencer was required by prior caselaw of this Court as well as a Kentucky statute.

Finally, the Kentucky Supreme Court is required by statute to consider the appropriateness of capital punishment in each case where the trial judge has accepted the jury's recommendation of the death penalty. The court below obviously took Petitioner's youthfulness into account when conducting this proportionality review.

ARGUMENT

The Eighth Amendment Does Not Immunize 17-Year-Old Capital Offenders From The Death Penalty On The Basis Of Chronological Age.

I.

Thompson v. Oklahoma, ___U.S.___, 108 S.Ct. 2687 (1988) is not dispositive of this case. Less than a majority of the Court in *Thompson* found that a national consensus of any kind exists on the issue of limiting capital punishment according to age. Although the four-Justice plurality in *Thompson* did so, neither the concurring opinion of Justice O'Connor nor the three-Justice dissent concluded that such agreement on the matter exists among the States.

The plurality, concurring, and dissenting opinions in *Thompson* all agreed, however, that evolving standards of decency on which any Eighth Amendment analysis must be based are reflected most accurately by legislative enactments:

> It will rarely if ever be the case that the members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

Thompson, 108 S.Ct. at 2715 (dissent).

> Thus, in confronting the question whether the youth of the defendant . . . is a sufficient reason for denying the state the power to sentence him to death, we first review relevant legislative enactments . . . .

Thompson, 108 S.Ct. at 2691 (plurality).

> Both the plurality and the dissent look initially to the decisions of American legislatures for signs of a national consensus about the minimum age at which a juvenile's crimes may lead to capital punishment.

Thompson, 108 S.Ct. at 270€ (concurrence).

Those who in *Thompson* found a national consensus against the capital punishment of 15-year-old defendants will find substantially less evidence to support that conclusion where 17-year-olds are concerned. A significantly larger number of States expressly authorize capital punishment for 17-year-old offenders.

In examining this evidence, it is important to remember that Petitioner rather than Kentucky bears the burden of proof:

> The deference we owe to the decisions of the state legislature under our federal system [citation omitted] is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." [citations omitted]

Gregg v. Georgia, 428 U.S. 153, 177 (1976).

> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 176.

Of the 36 death penalty States,[3] no more than twelve prohibit the capital punishment of 17-year-old

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[3] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.* (August 1, 1988) at 1.

offenders[4]. Thus, the death penalty States which permit capital punishment of this age group outnumber those which prohibit it by a ratio of at least two to one. The consensus clearly favors capital punishment of 17-year-old offenders.

More important than the presence of a consensus favoring capital punishment of juveniles is the *absence* of a consensus *opposing* it. Because the constitutional validity of an authorized punishment is presumed, Petitioner has the burden of proving that the practice enjoys virtually no acceptance among the States. *Gregg v. Georgia, supra,* 428 U.S. at 176-177. Petitioner cannot prove a consensus opposing the capital punishment of juveniles even if attention is confined to the States which have specified a minimum age for the death penalty. See footnote 4, *ante*. The death penalty States have not uniformly accepted any particular age minimum for capital punishment.

The Court should consider the number of States which have not specified in their death penalty statutes a minimum age for capital punishment, but it

[4]Appendix 4 of Petitioner's brief includes New Hampshire among a list of twelve States limiting capital punishment to persons over 18 years of age, since N.H.Rev.Stat.Ann. §630:5(XIII) (Supp. 1988) prohibits the execution of minors. N.H.Rev.Stat.Ann. §21-8:1 lists 19 as its age of majority, but §630:5(V) provides that the age limit for capital punishment is 17. Owing to this discrepancy, Petitioner's Appendix 4 lists three States having an age limit of 16, three States having an age limit of 17, and twelve States having an age limit of 18. Arguably, the list should be three, four and eleven, respectively. The dissent in *Thompson*, 108 S.Ct. at 2718, counted four States as having an age limit of 17, apparently including New Hampshire among that group. This accounts for the assertion in Kentucky's amicus brief (Heath A. Wilkins v. Missouri, No. 87-6026 and Jose Martinez High v. Walter Zant, Warden, No. 87-5666) that 25 rather than 24 of the death penalty States authorize the capital punishment of persons under 18 years of age. *Id.* at 10, n.4.

should exclude from the calculation the non-death penalty States. Neither category of States has expressly indicated a policy that capital punishment should be limited according to age. Obviously, no State which lacks a death penalty would have occasion to speak on the subject of limiting that form of punishment on the basis of age. Therefore, non-death penalty States are false indicators concerning the issue before this Court. On the other hand, it is reasonable to consider the death penalty States which do not specify a minimum age since they do subject juveniles to capital punishment. A death penalty State would have no reason to speak on the subject of age limitations unless it chose to specify a minimum. One could hardly expect the legislature to expressly state there is no minimum age for capital punishment or for any other form of criminal penalty.

Even the 14 non-capital States subject 16 and 17-year-old juvenile murderers to their most severe authorized punishment:

1). *Alaska* has no age limitation restricting waiver and transfer of individuals less than 18 years to criminal court. Alaska Stat. §47.10.060 (1984). Any person waived to stand trial as an adult is subject to the maximum punishment of imprisonment for 99 years. Alaska Stat. §12.55.125.

2). *Hawaii* permits transfer of a person 16 or 17 years old to criminal court upon waiver of jurisdiction by the family court after a hearing. Haw.Rev.Stat. §571-22. The maximum punishment carries a penalty of life imprisonment without possibility of parole subject to commutation after twenty years to life imprisonment with parole. Haw.Rev.Stat. §706-656.

3). *Iowa* allows waiver of any individual between 14 and 18 years old. A person waived from juvenile court is subject to the maximum penalty of life in

prison. 37 Iowa Code Ann. §902.1 (Supp. 1988).

4). *Kansas* permits 16 and 17-year-olds to be waived to adult criminal court. Certain categories of 16-year-olds are exempt from juvenile court jurisdiction and subject to prosecution as an adult. Kan.Stat.Ann.§§21-3611; 38-1602(b)(3)(4)(6); 38-1604(a). There is no restriction for imposing the maximum penalty of life in prison on this class of individuals. Kan.Stat.Ann. §21-4501(a) (Supp. 1988).

5). *Maine* has no age limitation in its waiver statute. Chapter 503, Title 15-3101. A sentence of life in prison is the maximum penalty which may be imposed. Chapter 51, Title 17A-1152.

6). *Massachusetts* juvenile courts have no jurisdiction over 17-year-olds. Mass.Gen.Laws Ann. Ch. 119, §21 (Supp. 1988). Fourteen, 15 and 16-year-olds may be waived to adult criminal courts. *Id*. The maximum penalty which may be imposed is life imprisonment. *Id*. Ch. 265, §2.

7). *Michigan* treats 17-year-olds as adults with juvenile courts having concurrent jurisdiction of offenders between 17 and 18 years of age and charged with certain enumerated offenses or conduct. Mich.Laws Ann. §712A.2(d) (Supp. 1988). Waiver is allowed for individuals age 15 and 16 charged with committing felonies. *Id*. 712A.4(1). The maximum penalty is life imprisonment. *Id*. 750.316.

8). *Minnesota* permits waiver of individuals aged 14, 15, 16 and 17. Waiver is mandatory in certain cases and a prima facie case of nonamenability to treatment within the juvenile court system is considered established if the individual is charged with certain enumerated offenses. Minn.Stat.Ann. §260.125(1),(3) (1989). The maximum period of incarceration is life. §609.10.

9). *New York* juvenile courts have no jurisdiction over any individual older than 16. Juvenile court jurisdiction is also excluded for individuals aged 13 or older charged with second degree murder and individuals 14 and older charged with second degree murder or other enumerated violent crimes. N.Y.Fam.Ct.Act §301.2(1)(b) (C.L.S. 1983); N.Y. Penal Law §§10(18), 30(2) (C.L.S. Supp. 1987); N.Y.Crim.Pro.Law §§180.75, 190.71, 210.43, 220.10(5)(g) (C.L.S. 1982 and Supp. 1987). The maximum penalty for a juvenile offender (under 16) is life with an indeterminate sentence of a minimum of not less than 5 years but not to exceed 9 years and a maximum of at least 3 years. N.Y. Penal Law §70.05 (C.L.S. Supp. 1988).

10). *North Dakota* allows persons 14, 15, 16 and 17 to stand trial as adults after a waiver hearing. In the case of a 14 or 15-year-old the charged offense must involve infliction or threat of serious bodily harm. Sixteen and 17-year-old may request waiver and transfer. N.D. Cont.Code §27-34(1). The maximum punishment is life without eligibility for parole for 30 years, less sentence reduction for good conduct N.D. Cont. Code §2.1-32.01.

11). *Rhode Island* permits waiver of 16 and 17-year-olds charged with indictable offenses. R.I. Gen.Laws Ann. §14-1-7. The maximum penalty for murder is life without eligibility for parole. R.I. Gen.Laws Ann. §§11-23-2, 12-19.2-1 (Cum. Supp., 1988).

12). *West Virginia* permits waiver from juvenile court of any person charged with murder regardless of age. W.Va. Code Ann. §49-5-10(c)(d). The maximum sentence is life without parole unless the jury recommends mercy. W.V. Code Ann. §62-3-15 (Supp. 1988).

13). *Wisconsin* allows persons 16 and 17 to be

waived from juvenile court jurisdiction to stand trial as adults. The maximum penalty for first degree murder is life in prison. Wisc. Stat.Ann. §§939.50(3)(a), §940.01 (Supp. 1988).

14). *Vermont* has no juvenile court jurisdiction of delinquents over 16. Vt.Stat.Ann. Title 33 §632(a)(1). Waiver is allowed for individuals 10 years of age but less than 14 for murder and other enumerated crimes. *Id*. Title 33 §635a.(a). Juvenile courts have no jurisdiction over persons 14 and 15 charged with murder or certain other crimes unless the case is transferred from criminal court to juvenile court. The maximum penalty for murder in the first degree is life imprisonment for a minimum term of 35 years; with a finding of mitigation, for a minimum of not less than 15 years; and up to and including life without parole. Title 13 §2303(a) (Cum. Supp., 1988).

As the Court can see, even though these States prohibit capital punishment, all 14 recognize that some offenders of this age group should be treated as adults in terms of culpability and accountability for crimes they commit. Once the determination is made that teenaged offenders should be tried as adults and held responsible for their violent acts, no limitation is placed on the maximum penalty which may be imposed. They are to be treated as any other adult criminal. The juvenile justice system no longer affords them protection from punishment merely because of age. The societal consensus of all 14 non-capital States is that 16 and 17-year-old murderers, by reason of age alone or the serious nature of the offense or other considerations determined by waiver hearings, should be subject to the most severe punishment authorized by their statutes. There is no consensus among these 14 States that 16 and 17-year-old murderers, once waived for trial as an adult, should not suffer maximum penal-

ties. The consensus shows the contrary, just as it does where the death penalty States are concerned.

Petitioner cannot escape the fact that even by his own account half[5] of the States in this country subject 17-year-old capital offenders to the death penalty. This falls far short of proving a consensus against the practice, especially when the enactments of Congress are considered. Federal statutes authorize the death penalty for espionage, murder by members of the military, the destruction of aircraft or motor vehicles resulting in death, the retaliatory murder of an immediate family member of a law enforcement official, the murder of certain high ranking executive officials or of a Supreme Court Justice, killing by mail, the destruction of a train resulting in death, murder during the course of a bank robbery, treason, *et cetera*. See *Thompson, supra*, 108 S.Ct. at 2715, n.1. (dissent). Yet of all the federal crimes for which Congress has authorized the death penalty, only one is limited according to the age of the offender[6].

From the foregoing enactments by the State and federal legislatures, it is evident that the idea of subjecting 17-year-old capital offenders to the death penalty has garnered widespread acceptance throughout this country. Certainly there is no legislative consensus against such a practice. Because these legislative pronouncements are the most reliable indicia of modern societal standards pertaining to this matter, their failure to clearly demonstrate a uniform opposition to the capital punishment of juveniles should end the inquiry now before the Court.

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[5] See footnote 4, *ante*.

[6] Section 408 of the Controlled Substances Act of 1984, 21 U.S.C. 848, permits imposition of the death penalty for certain drug related killings. A recent amendment to that statute exempts persons under the age of 18 years from capital punishment, 134 Cong.Rec. H. 11172 (October 21, 1988); 134 Cong.Rec. S. 7580 (June 10, 1988).

The *Thompson* concurrence correctly noted *Furman v. Georgia,* 408 U.S. 238 (1972) as an example of why the evidence of a consensus against capital punishment must be clear and convincing:

> In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. Indeed, counsel urged the Court to conclude "that the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced," *Furman v. Georgia,* 408 US 238, 386, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (Burger, C.J., dissenting). We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

Id. at 2709.

In his brief, Petitioner discusses various statistics other than those derived by comparing the legislative enactments of the States. He notes that the last execution of a juvenile in Kentucky took place 44 years ago. That circumstance is useless in this analysis, since the last execution of an adult in Kentucky occurred in 1962.

Petitioner suggests that his case is one of only six post-*Furman* cases in which a juvenile was tried as an adult capital offender in Kentucky. In *Thompson*

v. Oklahoma, supra, the plurality found that only about two percent of all arrests for willful homicide are committed by Thompson's age range of 0 to 16 years old.[7] The number of arrests involving the 17 to 18 age group should also seem relatively small because the adult population may always be expected to outnumber the population of 17-year-olds.

Petitioner further points out that he is one of only two juveniles actually sentenced to death in Kentucky after *Furman* was decided. According to his own evidence, however, those two cases represent half of the opportunities for a Kentucky jury to do so during the 17 year period between 1972 and the present.

As the plurality in *Thompson v. Oklahoma* did, 108 S.Ct. at 2696, Petitioner refers to the opposition voiced by various special interest organizations. In a democratic society such as the United States only the minority would be expected to speak out in opposition. If those groups represented the majority view, they would not find it necessary to advocate that the law be changed. Consequently, this too is an unreliable factor.

Next, the Petitioner offers as evidence the laws of other countries. Much like his argument concerning non-capital States, the evidence pertaining to the laws of other countries is confounded by the fact that all but three of the 22 Western Europe and other Anglo-American nations have no death penalty at all for "ordinary crimes" (except wartime offenses or under circumstances not at issue here). See *Thompson v. Oklahoma,* 108 S.Ct. at 2696 (plurality opinion). The untrustworthiness of such cross-national comparisons is attributable to not only the substantial differences in

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[7] "The Department of Justice statistics indicate that about 98% of the arrests for willful homicide involved persons who were over 16 at the time of the offense." *Id.* at 2700.

culture and heritage, but to the very nature of crime in other countries. According to the available information, the per capita homicide rate in the United States is as much as two to 10 times higher than that of many other countries[8]. It cannot reasonably be said that this fact is insignificant in forming the attitudes of other countries with regard to capital punishment, or that the same view would be taken if these nations had a comparable homicide rate. Petitioner has not attempted to show that comparable crime rates exist in other countries. In fact, the evidence concerning juveniles is to the contrary[9].

Finally, the Petitioner cites three international treaties as authority requiring an interpretation of the Eighth Amendment that would exempt his age group from capital punishment. Two of the treaties relied upon by Petitioner, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, have never been ratified by the United States. The third treaty, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, has been ratified but it applies only during war and even then does not prevent any country from executing its own citizens. See 6 U.S.T. 3516, 3520, 2522.

In view of all the foregoing, two things become clear when the *Thompson* plurality's criteria for a so-

[8] Landau, "Trends In Violence And Aggression: A Cross-Cultural Analysis," 22 Annales Internationales de Criminologie (International Annals of Criminology) 119, 130-131 (1984); Wolfgang and Zahn, "Homicide: Behavioral Aspects," 2 Encyclopedia of Criminal Justice 848, 850-851 (1983).

[9] "[I]n contrast to the pattern in the United States, the increase in crime found so prominently among the young people in Europe seems to have been concentrated among young adults between eighteen to twenty-five years of age instead of youths under eighteen." Ferdinand, "Crime Statistics: Historical Trends In Western Society," 1 Encyclopedia Of Criminal Justice 392, 399 (1983).

cietal consensus are examined. First, *none* of the 18 States that specify a minimum age have drawn the line below Thompson's age.

Significantly, as many as seven of those 18 States have drawn a line below Stanford's age[10]. Thus the evidence pertaining to this criterion, which all three *Thompson* opinions appeared to consider the most important, offers far less support for Petitioner's stance in the present case. Secondly, the other factors relied upon in *Thompson* now appear to be less reliable than was first thought. When the considerations discussed herein are analyzed in the context of a constitutional doctrine which presupposes the validity of a statute such as the one at issue, *Gregg v. Georgia, supra*, 428 U.S. at 176-177, it is reasonable to conclude that Petitioner has failed to prove his case. There is not such widespread opposition to the execution of 17-year-old capital offenders that the practice must be prohibited as a *per se* violation of the Eighth Amendment.

II.

In part F of his brief, Petitioner seeks support from the *Thompson* concurrence by arguing that Kentucky lacked a specific age minimum for capital punishment at the time these crimes were committed. Petitioner characterizes the *Thompson* concurrence as a view that all capital sentencing statutes violate the Eighth Amendment *per se* unless they specify in the same enactments a minimum age for the death penalty.

Kentucky interprets the *Thompson* concurrence differently. The concern there was not so much with statutory format as it was with the legislature's awareness that juveniles would be eligible for the death penalty:

[10] See footnote 4, *ante*.

> Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature *either did not realize* that its actions would have the effect of rendering 15-year-old defendants death-eligible *or did not give the question the serious consideration* that would have been reflected in the explicit choice of some minimum age for death eligibility.

Thompson, supra, 108 S.Ct. at 2710-2711 (concurring opinion, emphasis added).

In this case the evidence that Kentucky's legislature had "give[n] the question . . . serious consideration," *id.*, is irrefutable. Consequently, there was no risk whatsoever that before Petitioner committed these crimes the Kentucky legislature failed to realize the reach of its death penalty statutes.

The statute under which Petitioner was transferred to the circuit court for trial as an adult did not specify a minimum age for capital punishment. It did, however, specify a minimum age of 16 for non-capital felony convictions:

> Ky. Rev. Stat. §208.170. Proceedings against children suspected of felony [Repealed effective July 15, 1984.]-(1) If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense,

> and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

That statute remained in effect until 1987, at which time it was replaced by Ky.Rev.Stat. §§635.020 and 640.040. The first of these statutes, Ky.Rev.Stat. §635.020, in relevant part provides:

> (2) If a child over fourteen (14) before the court has been charged with a capital offense, Class A felony or Class B felony, the court shall initially proceed in accordance with the provisions of KRS 640.010.

Ky.Rev.Stat. §640.040(1) specifies a minimum age of 16 for capital punishment:

> No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.

It is difficult to imagine how the legislature could have failed to *consider* a minimum age for capital punishment when, in the same statute, it specified a

minimum age for non-capital offenders. Ky.Rev.Stat. §208.170(1). Further compelling evidence is found in a 1980 Act of the Kentucky legislature which, although it never took effect, clearly demonstrates that a minimum age for capital punishment had been considered prior to Petitioner's 1981 crimes. That enactment, Ky.Rev.Stat. §208F.040(1), would have exempted 18-year-olds from capital punishment:

> No youthful offender who has been convicted of a capital offense shall be sentenced to capital punishment, but instead shall be sentenced to a term appropriate for one who has committed a Class A felony.

Even those death penalty States which do not specify a minimum age for capital punishment deserve a presumption that one legislative hand knows what the other has done. Some of the State legislatures, for example, have arranged their penal codes so that crimes are defined in one volume or chapter while the various penalties therefor and defenses thereto are provided in another. Such an organizational arrangement would not perforce invalidate an entire penal code or any part of it[11].

> It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . we are especially justified in presuming both that those representatives were aware of the prior interpretation . . . and that their interpretation reflects their intent . . . .

[11] "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Tennessee v. Garner*, 471 U.S. 1, 28 (1984) (O'Connor, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984).

Cannon v. University of Chicago, 441 U.S. 677, 696, 698 (1979)[12].

[12] *See also, e.g., Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 319 (1983); *Shapiro v. United States*, 35 U.S. 1, 16 (1947); *Lewis v. United States*, 445 U.S. 55, 61-64 (1980); *Roche Products v. Bolar Pharmaceutical Co.*, 733 F.2d 858 (D.C. Cir. 1984); *Florida Nat. Guard v. Federal Labor Rel. Authority*, 699 F.2d 1082 (11th Cir. 1983); *Martin v. Luther*, 689 F.2d 109 (7th Cir. 1982); *United States v. Professional Air Traffic Controllers*, 653 F.2d 1134 (7th Cir. 1981); *Air Transport, Etc. v. Profess. Air Traffic, Etc.*, 667 F.2d 316 (2nd Cir. 1981); *Anderson Seafoods, Inc. v. Graham*, 529 F.Supp. 512 (N.D. Fla. 1982); *Anderson v. Black & Decker*, 597 F.Supp. 1298 (E.D. Ky. 1984); *Daou v. Harris*, 139 Ariz. 353, 678 P.2d 934 (1984); *In re Misener*, 213 Cal.Rptr. 569, 38 C.3d 543, 698 P.2d 637 (1985); *Ingram v. Cooper*, Colo., 698 P.2d 1314 (1985); *State v. Dupree*, 196 Conn. 655, 495 A.2d 691 (1985); *Giuricich v. Emtrol Corp.*, Del., 449 A.2d 232 (1982); *State v. Dunmann*, Fla., 427 So.2d 166 (1983); *Leonard v. Benjamin*, 253 Ga. 718, 324 S.E.2d 185 (1985); *Marsland v. Pang*, 5 Hawaii App. 463, 701 P.2d 175 (1985); *People v. Palmer*, 84 Ill.Dec. 658, 104 Ill.2d 340, 472 N.E.2d 795 (1984); *Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, Ky., 690 S.W.2d 393 (1985); *Bunch v. Town of St. Francisville*, La.App., 446 So.2d 1357 (1984); *Mayor and City Council of Baltimore v. Hackley*, 300 Md. 277, 477 A.2d 1174 (1984); *People v. Smith*, Mich., 378 N.W.2d 384 (1985); *Kilowatt Organization (TKO), Inc. v. Dept. of Energy, Planning and Development*, Minn., 336 N.W.2d 529 (1983); *Holt v. Burlington Northern R. Co.*, Mo.App., 685 S.W.2d 851 (1984); *Thiel v. Taurus Drilling Ltd.*, Mont., 710 P.2d 33 (1985); *Douglas County v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982); *Boulder City v. General Sales Drivers, Etc.*, 101 Nev. 117, 694 P.2d 498 (1985); *Mahwah Tp. v. Bergen County Bd. of Taxation*, 98 N.J. 268, 486 A.2d 818 (1985); *Garrison v. Safeway Stores*, 102 N.M. 179, 692 P.2d 1328 (1984); *Arbegast v. Board of Ed. of South New Berlin Cent. School*, 490 N.Y.S.2d 751, 65 N.Y.2d 161, 480 N.E.2d 365 (1985); *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984); *State v. Clark*, N.D., 367 N.W.2d 168 (1985); *Commonwealth v. Milano*, 300 Pa. Super. 251, 446 A.2d 325 (1982); *State v. Feiok*, S.D., 364 N.W.2d 536 (1985); *Brown-Forman Distillers Corp. v. Olsen*, Tenn.App., 676 S.W.2d 567 (1984); *Driscoll v. Harris County Com'rs. Court*, Tex.App., 688 S.W.2d 569 (1985); *Murray City v. Hall*, Utah, 663 P.2d 1314 (1983); *State v. Peterson*, 100 Wash.2d 788, 674 P.2d 1251 (1984); *Pullano v. City of Bluefield*, W.Va., 342 S.E.2d 164 (1986); *In Interest of P.*, 119 Wisc.2d 349, 349 N.W.2d 743 (1984); *Capwell v. State*, Wyo., 686 P.2d 1148 (1984).

Carried to its logical conclusion, Petitioner's interpretation of the *Thompson* concurrence would exempt juvenile murderers from *non-capital* punishments as well as from the death penalty. According to Petitioner's approach, a teenaged killer could not even be sentenced to life in prison unless the homicide statute itself specified a minimum age. Such an approach is neither reasonable nor required by the Eighth Amendment.

It would be unrealistic to conclude from statutory format alone that a State has failed to appreciate or seriously consider the scope of its death penalty law. All 36 of the death penalty States have either passed or amended in some manner their juvenile waiver statutes *after* they enacted their post-*Furman* capital punishment statutes.[13]

[13] Ala.Code §12-15-34(a)(Repl.1986); Ariz.Rev.Stat.Ann. §8-202 (1974 and Supp. 1984); Ariz. R.P. Juv.Ct. 12, 14; Ark. Code Ann. §§5-1-116(b), 5-10-101 (1987); Cal.Pen.Code §190.5 (1988); Col.Rev.Stat.§16-11-103 (1)(a)(Repl.1986); Conn. Gen.Stat.Ann. §53a-46a(g)(1) (1987); 10 Del.Code Ann. §938(a)(1)(1975), 11 Del.Code Ann. §§636, 4209 (Repl. 1987); Ga. Code Ann. §15-11-5, §17-9-3 (1982); Fla.Stat.Ann. §39.02(5)(c)(1)(Supp. 1988); Idaho Code §16-1806 (l)(a)(Supp. 1988); 38 Ill.Ann.Stat. §9-1(b)(Supp. 1988); Ind. Code Ann.§35-50-2-3(b)(Supp. 1988); Ky.Rev.Stat. §640.040(l)(Supp. 1987); La. Rev.Stat.Ann. §§14.30, 13:1570(A)-(5)(1986); 27 Md. Code §412(f)(Repl. 1988); Miss. Code Ann.§43-21-151(3)(Supp. 1987); Mo.Rev. Stat. §211.071.1 (1988); Mont. Code Ann. §§41-5.206(1)(a)(i), 45-5-102 (1987); Nebr. Rev. Stat. §28-105,01 (1985); Nev. Rev. Stat. §176.025 (1987); N.H. Rev. Stat. Ann. §§21-B:1, 630.1 (V), 630.5 (XIII)(1986, Supp. 1987); N.J. Stat. Ann. §§2A:4A-22(a), 2C:11-3(g)(Repl. 1987, Supp. 1988); N.M. Stat. Ann. §§28-6-1(A), 31-18-14(A), 32-1-29(Repl. 1987); N.C. Gen.Stat. §§7A-608, 13-17 (Supp. 1987); Ohio Rev. Code Ann. §2929,02(A)(1986); 10 Okla. Stat.Ann. §§1104.2(A), 1112(b)-(1987); 21 Okla. Stat.Ann. §701.9 (Supp. 1989); Ore. Rev. Stat. §§161.620, 419.476(1)(1987); 42 Pa. Cons.Stat.Ann. §6322(a)(1978) & §6355(a)(1), (e)(1982); S.C. Code Ann.§20-7-430(4)(6)(1988); S.D. Cod.L.Ann. §§26-8-7, 26-11-4 (1988); Tenn. Code Ann.§§37-1-102(3), 37-1-134(a)(1); Tex. Pen.Code Ann. §8.07(d)(Supp, 1989); Utah Code Ann. §78-3(a)25(l)(Supp. 1988); Va. Code Ann. §16.1-269(A), §18.2-31(Supp. 1988); Wash.Rev. Code §§9A.32.030(2), 10.95.020, 13.40.110 (1)(a) (1988, Supp. 1988); Wyo.Stat.Ann. §6-2-101, §14-6-23 (1986).

It is a necessary rule of statutory construction to assume that one legislative hand knows what the other has done, and this is an especially safe assumption given the relative timing of the enactments and revisions at issue here. In view of the foregoing, Petitioner's assertion that any State has unwittingly exposed youthful murderers to capital punishment is less than credible.

III.

State legislatures set the maximum age for juvenile jurisdiction as high as they do to benefit every arguably immature offender, even at the obvious expense of including many individuals who do not deserve such protection. By reaching beyond the common denominator of chronological immaturity, the States are justified in examining each juvenile individually to determine whether an exception should be made in his or her particular case. As the Court has emphasized on prior occasions, maturity and sophistication are factors which vary from individual to individual, so chronological age is only one of the various circumstances that should be taken into account.

> Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully "street-wise," hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in *In re Gault,* 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have.

Fare v. Michael C., 442 U.S. 707, 734, n.4 (1979) (Powell, J., dissenting).

In urging the Court to discover in the Eighth Amendment a minimum age for capital punishment, Petitioner contends that 17-year-olds are invariably too immature for such punishment. His position on the matter runs afoul of a long line of decisions by this Court. During the 17 years since *Furman v. Georgia, supra* was decided, the theme of this Court's death penalty opinions has been that the appropriateness of such a punishment must be determined on an individualized basis.

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.' *California v. Brown,* 479 U.S. 538 (1987) (O'Connor, J., concurring)." *Thompson* at 2698.

Guided, individualized consideration of the offender's character and the circumstances of his crime is the touchstone of capital sentencing. *See Zant v. Stephens,* 462 U.S. 862, 879 (1983), collecting cases. *Gregg v. Georgia,* 428 U.S. 153 (1976) and its progeny are intended to avoid the kind of "rigid", "mechanical" and "wholly arbitrary" determination urged here by Petitioner. *Barclay v. Florida,* 463 U.S. 939, 950 (1983). No particular circumstance of a capital offender's crime should automatically require the death penalty, *Woodson v. North Carolina,* 428 U.S. 280 (1976), *Roberts v. Louisiana,* 428 U.S. 325 (1976), or automatically foreclose it, *Tison v. Arizona,* 483 U.S.___ , 107 S.Ct. 1676 (1987). Rather, the sentencer must be "free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos,* 463 U.S. 992, 1008 (1983). Youthfulness is only one such factor and it is not necessarily the most important.

Maturity varies from individual to individual. Some individuals never attain it; some do at an age labeled "child." "Some of the older minors become fully

'street-wise,' hardened criminals, deserving no greater consideration than that properly afforded all persons suspected of crime." *Fare v. Michael C., supra,* 442 U.S. at 734, n.4.

The need for individual consideration of the defendant's character and the circumstances of his crime becomes glaringly apparent now that a question of Jose Martinez High's true age has been raised[14]. Has High suddenly become more deserving of the death penalty as a 19-year-old murderer, or less deserving of death penalty as a 17-year-old murderer? Neither the circumstances of the crime nor the defendant's character at the time he committed the crime have changed. There is no reason relating to the crime or the defendant which should preclude the death penalty for High. To draw a bright-line rule prohibiting execution of anyone less than 18 years of age, and thus prohibiting High's execution if Georgia cannot establish his age at 19, undermines the very purpose of individualized sentencing of offenders, which is to fashion a sentence appropriate to the crime.

Juveniles who are tried as adults receive the benefit of individualized consideration twice, before their transfer from the juvenile court and again when they are tried as an adult.

No national policy of automatic exemption for 17-year-olds from the death penalty exists. For those 17-year-olds subject to juvenile court jurisdiction, waiver proceedings provide individual consideration of whether the offender can best be served by the juvenile or criminal justice system. *Kent v. United States,* 383 U.S. 541 (1966) requires a hearing, assistance of counsel and a statement of reasons for the transfer.

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[14] After the State of Georgia filed a suggestion of mootness by reason of newly discovered evidence concerning High's birthdate, the Court substituted the present case in place of his. (JA 156).

These minimum Due Process rights provide additional safeguards that offenders with presumptive juvenile status will not be arbitrarily reclassified as adults.

In *all* States where juveniles are eligible for the death penalty, their youth must be presented as a mitigating factor to the sentencer. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Twenty-nine States[15] have adopted the holding of *Eddings* through legislation designating the defendant's age as a mitigating factor in capital cases.

In every trial where death is a possible penalty, a 16 or 17-year-old will be accorded consideration of his youth in the assessment of punishment. Age alone should not exclude a punishment otherwise deemed appropriate considering the defendant's character and criminal act.

Petitioner's case is illustrative of the extent to which juveniles charged with capital crimes are given procedural safeguards beyond those conferred upon adult offenders.

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[15] Ala.Code §13A-5-51(7) (Repl.1982); Ariz.Rev. Stat.Ann.§13-703(G(5)(Supp. 1988); Ark.Code Ann. §5-4-605(4)(1987); Cal.Penal Code §190.05(h)(9)(West 1988); Col.Rev.Stat.§16-11-103(5)(a)(Repl.1986); Conn.Gen.Stat.Ann.§53a-46(a)(g)(1)(1987); Fla.Stat. Ann.§921.141(6)(g)(1985); Ind.Code Ann. §35-50-2-9(c)(7) (Cum.Supp.1988); Ky.Rev.Stat.Ann. §532.025(2)(b)(8)(Cum.Supp. 1988); La.Code Crim. Proc., art. 905.5(f)(1984); 27 Md.Code §413(g)(5)(Repl.1988); Miss.Code Ann. §99-19-101(6)(g)(Cum.Supp.1987); Mo.Rev.Stat. §565.032.3 (7)(1988); Mont.Code Ann. §46-18-304(7)(1987); Nebr.Rev.Stat. §29-2523(2)(d)(1985); Nev.Rev. Stat.§200.035(6)(1987); N.H.Rev.Stat.Ann. §630.5(II)(b)(5)(1986); N.J.Stat.Ann. §2C:11-3 (c)(5)(c)(Supp. 1988); N.M.Stat.Ann. §31-20A-6 (i)(Repl.1987); N.C. Gen.Stat.§15A-2000(f)(7)(Supp. 1987); Ohio Rev.Code Ann. §2929.04(8)(4)(1986); Ore.Rev.Stat. §163.150(1)(b)(8)(Supp. 1988); 42 Pa.Cons.Stat.Ann. §9711(e)(4)(Supp. 1987); S.C.Code Ann. §16-3-20(C)(b)(7)(9) (Supp. 1987); Tenn.Code Ann.§39-2-203(j)(7)(Cum. Supp.1988); Utah Code Ann. §76-3-207(2)(e)(Supp.1988); Va.Code Ann. §19.2-264,4(8)(v)(Supp. 1988); Wash.Rev.Code §10.95.070(7) (Cum.Supp. 1988); Wyo. Stat.Ann. §6-2-102(j)(vii)(1988).

First, the statute under which juvenile court jurisdiction was waived set out various criteria for determining whether Petitioner should be held accountable as an adult and transferred to the circuit court accordingly. Ky.Rev.Stat. §208.170 stated:

> (1) If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.
>
> (2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe than an offense was committed and that the child committed the offense.
>
> (3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the

use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

(5) When the juvenile session of district court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile session of district court. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile session of district court.

(b) If an indictment is returned,the court may in its discretion order the case transferred to the juvenile session of district court.

(c) If an indictment is returned and the court does not transfer the case to juvenile session of district court, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult. (Enact. Acts 1952, ch. 161, §17; 1954, ch. 193, §4; 1956, ch. 157, §26; 1962, ch. 212, §4; 1974, ch. 406, §308; 1976, ch. 168, §6; 1980, ch. 188, §164, effective July 15, 1980.)

As previously detailed in the "Procedural History" segment of this brief, Petitioner had a long and continuous juvenile record of criminal offenses. His prior record included arson, burglary, sexual abuse, theft and assault, "to name but a few." *Stanford v. Commonwealth, supra,* 734 S.W.2d at 792. In addition, the

juvenile court judge noted that on prior occasions, Petitioner had been sent to five different treatment facilities. (JA 9). The juvenile court conducted separate hearings to determine probable cause for Petitioner's arrest and to consider whether he should be transferred to the circuit court for trial as an adult. (JA 7-8). As a result of those proceedings, the juvenile court made specific written findings. (JA 10).

Second, the Petitioner was indicted by a grand jury not once but twice since in the first instance, the grand jury had not been informed of its option to recommend his transfer back to the juvenile court. Ky.Rev.Stat. §208.170(5)(a); (3/1/82 Hearing 179-180, 210-217; 3/8/82 Hearing 91-100).

The statute also gave the circuit court the option of considering this matter anew and returning Petitioner back to the district court for trial as a juvenile. Ky.Rev.Stat. §208.170(5)(b); (JA 11-15, 42-44).

At trial, Petitioner's jury was instructed to consider his youthfulness in mitigation of these crimes. (JA 99-100).

Finally, the Kentucky Supreme Court obviously took Petitioner's youthfulness into account when conducting its proportionality review of the death sentence. *Stanford v. Commonwealth, supra,* 734 S.W.2d at 792-793.

In view of all the careful consideration given to Petitioner, this Court should hold that his sentence of death does not violate the Eighth Amendment.

CONCLUSION

WHEREFORE, the opinion below should be affirmed.

Respectfully submitted,

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